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RUEHNE/AMEMBASSY NEW DELHI PRIORITY 1859  
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RUEHKO/AMEMBASSY TOKYO PRIORITY 3365  
RUEHCG/AMCONSUL CHENNAI PRIORITY 8348  
RUEHBI/AMCONSUL MUMBAI PRIORITY 5831  
RUEHON/AMCONSUL TORONTO PRIORITY 0543  
RUEHGV/USMISSION GENEVA PRIORITY 2630  
RHHMUNA/HQ USPACOM HONOLULU HI PRIORITY  
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C O N F I D E N T I A L SECTION 01 OF 03 COLOMBO 000198

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DEPARTMENT FOR SCA/INS

E.O. 12958: DECL: 02/25/2018

TAGS: PGOV PHUM CE

SUBJECT: SRI LANKA: GOVERNMENT CIRCUMVENTS CONSTITUTIONAL CHECK ON EXECUTIVE POWER

Classified By: CLASSIFIED BY AMBASSADOR ROBERT O. BLAKE, JR. REASONS:  
1.4(b,d).

**¶1.** (C) SUMMARY: Parliament adopted the 17th Amendment to the Sri Lankan Constitution in 2001, intending it to be a significant check on the powers of the Executive President. The 17th Amendment mandates an independent Constitutional Council (CC) responsible for nominating members to key public institutions, thus limiting political interference in the appointment process and promoting good governance. However, President Rajapaksa has obstructed the formation of the Council for the past two years, preferring to make extra-constitutional, direct presidential appointments to several important government bodies. In the coming months, several key posts, including Secretary-General of Parliament, Attorney General, a

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Supreme Court Justice, and an Appeal Court judge, will fall vacant. Thus, a further delay in reconstituting the CC would pave the way for more direct presidential appointments to key jobs. Civil society organizations recently brokered an agreement between minority parties, including both Sinhalese and Tamil nationalists, in an effort to break the logjam. However, the President has yet to appoint the Council in accordance with the constitutional requirement. End Summary.

What the 17th Amendment Says

**¶2.** (SBU) In September 2001, Sri Lanka's Parliament passed the 17th Amendment to the Constitution with a greater than two-thirds majority, in an effort to depoliticize key public institutions, particularly the police and public services. At the time, there was serious concern that then-President Chandrika Kumaratunga was exerting too great an influence over the country's public institutions through politically motivated appointments, transfers, promotions, and disciplinary control of officers of key public bodies.

¶3. (U) The 17th amendment mandates the creation of a 10-member Constitutional Council (CC) to serve two primary functions: 1) nominate members to important commissions (the Elections Commission, Public Service Commission, National Police Commission, Human Rights Commission, Permanent Commission to Investigate Allegations of Bribery or Corruption, Finance Commission, and Delimitation Commission), who are then appointed by the president. 2) It also approves appointments to key public offices (including auditor general, inspector general, chief justice and judges of the Supreme Court, and the president and judges of the Court of Appeal). This independent control over important appointments was designed to check the president's previously unrestrained power in the appointment process.

¶4. (U) The CC is to be composed of the Prime Minister, the Speaker of Parliament, the Leader of the Opposition, one person appointed by the President and five people appointed on the nomination of both the Prime Minister and the Opposition Leader. (Note: in nominating the group of five, the Prime Minister and the Opposition Leader are to consult the leaders of all political parties and independent groups represented in Parliament.) The final member is to be nominated by agreement of a majority of the minority parties represented in Parliament (those parties other than the Prime Minister's party and the chief opposition party). Except for the first three persons listed above, all nominees must be distinguished public figures who are not members of any political party. According to the amendment, once the President receives written notice of the latter six nominations, he must "forthwith" make the respective appointments.

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#### History of Circumventing Constitutional Council

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¶5. (SBU) Two successive Executive Presidents, Chandrika Kumaratunga and the incumbent, Mahinda Rajapaksa, have circumvented the 17th amendment by refraining from appointing nominees to the CC. They have filled the resulting void by making direct appointments (not vetted through the CC) to the commissions. A prominent public interest lawyer and columnist, Kishali Pinto-Jayawardena, assessed that "by early 2006, the 17th amendment had essentially broken down." Six vacancies on the CC had not been filled. As a result, the police and public service commissions had fallen under the control of the Inspector General of Police and the heads of ministries or departments, fundamentally violating the spirit and intent of the 17th amendment. Two senior judges of the Supreme Court resigned from the Judicial Service Commission (to which their appointments are subject to CC approval), citing reasons of conscience. Kishali Pinto-Jayawardena added that circumvention of the 17th amendment calls into question the government's commitment to constitutional democracy. In addition, she worried that disregard for constitutional provisions for governance in the south surely stokes the fears of ethnic minorities "that a similar fate may visit constitutional compromises of devolution or federalism."

#### Current State of Play

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¶6. (C) Today the CC remains unconstituted. For two years, the Tamil National Alliance (TNA) and the Sinhalese nationalist JVP could not agree on a nominee for the minority parties. President Rajapaksa made no effort to compel the minority parties to come to agreement, instead exploiting the situation by appointing political cronies beholden to him to public institutions.

¶7. (SBU) In large part due to lobbying by the Organization of Professional Associations (OPA), which initially proposed the 17th amendment, the TNA and JVP finally agreed on a compromise nominee, former Auditor General S.C. Mayadunne. This should have cleared the way to activate the CC. Yet President Rajapaksa appears to be in no hurry to appoint Mayadunne. Chief government whip Jeyaraj Fernandopulle cited a potential conflict of interest, Mayadunne's current consultancy contract to two Parliamentary Committees. Most observers see this as a peripheral concern. Moreover, Mayadunne made it clear he is willing to resign from the consultancy position if appointed to the CC.

¶8. (SBU) There are signs that the government may not be able to delay creation of the CC much longer. A broad-based coalition of civil society leaders is pushing the government and political parties to establish the CC. Religious heads, together with representatives of the Chamber of Commerce, the OPA, and the Law and Society Trust, met on February 14 to draft a proposal to the President and political parties and make plans for rallying public opinion if obstruction of the CC continues. But the President could be playing for time: several key government posts, including Secretary-General of Parliament, Attorney General, a Supreme Court Justice, and an Appeal Court judge, will fall vacant in the coming months. A further delay would pave the way for more direct presidential appointments to these key jobs.

¶9. (C) OPA President Elmore Perera, who has led the campaign for the CC from its inception, told Ambassador on February 19 that the President's continued use of extraconstitutional appointments under this scenario would

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make him vulnerable to a charge of intentional violation of the Constitution - an impeachable offense. The JVP, under increasing pressure to demonstrate independence of the President on ethical issues, has threatened to vote in favor of an impeachment motion, which needs only a simple majority. This would result in an automatic referral to the Supreme Court for an opinion. While this would likely not lead to the President's removal (which would require a two-thirds vote in Parliament), it would result in a huge embarrassment for Rajapaksa.

#### Critical Questions Facing a New Council

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¶10. (SBU) With the CC defunct, the National Police Commission recently extended the services of ten officials, in clear violation of existing procedures governing re-employment of retired personnel in public service. Other sensitive public sector appointments have also bypassed the 17th amendment and politicized the public service. If the CC were reconstituted, the immediate question would be whether those appointed to public institutions in the interim (i.e., unconstitutionally) retain their positions. Further, would decisions made by such persons, including judges, retain constitutional legitimacy, and hold if challenged in the future? Constitutional scholars tell us there is no clear answer to those questions, which will almost certainly have to be resolved by the Supreme Court. However, most take the view that while the interim appointments are voidable, the decisions taken by these functionaries would probably retain their validity.

¶11. (C) COMMENT: The Executive's circumvention of the 17th amendment severely undermines the independence and accountability of public institutions in Sri Lanka. It also stands in stark contrast to this same Government's trumpeting of the importance of implementing the 13th amendment to devolve power to the provinces (instead of the more ambitious power-sharing proposal being considered by

the APRC). President Rajapaksa, unwilling to pursue the obvious solution (appointment of the compromise nominee May adunne) seems intent on delaying activation of the CC as long as possible in order to continue his current extra-constitutional practice of directly naming members of the Election Commission and other important bodies. His political opposition is trying to bring maximum pressure on him to comply, but may well have trouble generating significant grassroots agitation on what is a relatively arcane - if still vital - issue. As a result, there may be a few innings left in this game, even though the eventual outcome does not appear in doubt.

BLAKE